

Michael J. Uda
R. Allan Payne
Suzanne Taylor
Doney, Crowley, Bloomquist & Uda, P.C.
Diamond Block, Suite 200
44 W. 6th Avenue
P.O. Box 1185
Helena, MT 59624-1185
(Telephone) (406) 443-2211
(Facsimile) (406) 449-8443
Email: muda@doneylaw.com

ATTORNEYS FOR PETITIONERS

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Petition of)	UTILITY DIVISION
The People of the State of Montana,)	
<i>Ex Rel.</i> Mike McGrath, Attorney General,)	DOCKET NO.
Flathead Electric Cooperative, Inc.,)	
And Roes 1 – 1000 for Rate Refunds)	

**PETITION OF THE PEOPLE OF THE STATE OF MONTANA, *EX REL.* MIKE
MCGRATH, ATTORNEY GENERAL, FLATHEAD ELECTRIC
COOPERATIVE, INC. AND ROES 1 – 1000 FOR RATE REFUNDS**

I. INTRODUCTION

Petitioners, The People of the State of Montana, *ex rel.* Mike McGrath, Attorney General of the State of Montana, Flathead Electric Cooperative, Inc., and Roes 1 – 1000 (hereinafter referred to as “Petitioners”), acting by and through counsel, hereby petition the Montana Public Service Commission (“Commission”) to issue rate refunds for excessive rates paid during 2000 and 2001 to all sellers of energy or capacity subject to the Commission’s jurisdiction that manipulated the western energy market. Pursuant to M.C.A. § 69-3-201 and § 69-3-321, the Commission had the duty to ensure that every public utility charges rates that are reasonable and just. Furthermore, pursuant to M.C.A.

§ 69-8-403(7) and § 69-8-408(2), the Commission has a duty to protect consumers from anticompetitive, abusive, fraudulent or deceptive conduct by energy and natural gas marketers and others. Due to the market manipulation that caused rates to skyrocket in 2000 and 2001, rates paid in Montana were unreasonable and unjust. As set forth herein, upon information and belief and subject to further discovery, Petitioners are entitled to rate refunds for the unreasonable and unjust charges. Furthermore, upon information and belief and subject to further discovery, the Commission should impose penalties of up to \$1,000 for each day that any fraudulent or deceptive practice was engaged in by any company licensed to market to retail customers in Montana.

II. PARTIES

The interests of the People of the State of Montana are being represented by Montana's Attorney General, Mike McGrath, as authorized by M.C.A. § 2-15-501 and § 30-14-222(1) (2001). Flathead Electric Cooperative, Inc. ("Flathead"), a Montana corporation, is a locally owned and operated rural electrical cooperative serving residential and commercial ratepayers in northwest Montana, which made purchases from the western energy markets during 2000 and 2001. Roes 1 – 1000 are parties that were injured by unjust and unreasonable charges during 2000 and 2001 whose actual names and capacities have not yet been discovered. This Petition seeks relief from all sellers of energy or capacity subject to the Commission's jurisdiction involved in the illegal manipulation of the western energy markets in 2000 and 2001.

III. BACKGROUND

This action is instituted to obtain relief in the form of rate refunds for unjust and unreasonable charges during 2000 and 2001 that resulted from the unlawful and unfair business practices involving the sale of gas or electric energy and manipulation of the market for wholesale energy. In the latter part of 2002, Petitioners became aware that the entire western energy market was unlawfully manipulated through price fixing and restriction of the energy supply into the markets operated by the California Power Exchange (“PX”) and the California Independent System Operator (“ISO”). Sellers of energy and capacity engaged in other conduct for the purpose of artificially inflating the price of electricity and/or charging unlawful prices for such electricity. The Federal Energy (“FERC”) has recently stated that the markets in the western grid are interconnected. Consequently, as a direct and foreseeable result of the misconduct by those engaged in market manipulation, retail and wholesale customers in Montana have paid substantially higher prices than they would have paid in a competitive and unmanipulated market.¹

The bad actors include companies that acted as brokers or marketers on the western power grid, and key electricity traders on the western power grid who “gamed” the power market and participated in other manipulative practices, thereby contributing to the illegal increase of power prices in the wholesale market. Certain of these companies engaged in a series of scams with names such as “Death Star,” “Ricochet,” “Wheel Out,” and “Get Shorty.” In addition, generation companies withheld generation or double sold it to the

¹ *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator (“ISO”) and Power Exchange (“PX”), et al.*, 96 FERC ¶ 61,418, at 62,556 (2001).

California ISO through a variety of schemes. These illegal scams collectively created artificial energy shortages in California and the west to the benefit of the bad actors. The market manipulation activities resulted in artificially inflated prices for energy and natural gas throughout the west, including Montana. As a result of these illegal and fraudulent schemes during 2000 and 2001, wholesale electricity rates far exceeded rates in an honest and fully competitive market. Due to this uncompetitive and manipulated market, Montana energy and natural gas consumers have paid and continue to pay electricity prices greatly in excess of rates that would have been charged in a truly competitive market. This Petition seeks to remedy the excessive rates charged to Montana's ratepayer due to the ongoing manipulation of wholesale energy prices and supply, which resulted in drastic energy shortages and price increases. Petitioners seek refunds of the unjust and unreasonable charges. Petitioners further seek the cancellation of the licenses of the bad actors identified herein who are licensed by the Commission to market electricity and/or natural gas in Montana to retail customers.

IV. UNJUST AND UNREASONABLE CHARGES

On February 13, 2002, FERC launched a major investigation into the causes for the "wildly dysfunctional" western energy markets.² In FERC's report of March 26, 2003, the staff reported that it found evidence of manipulation of both electricity and

² *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator ("ISO") and Power Exchange ("PX"), et al.*, 96 FERC ¶ 61,120, at 61,521 (2001)(Opinion of Commissioner Massey, dissenting in part & concurring in part).

natural gas markets.³ FERC also found that the electric and gas markets in the west are inextricably linked.⁴

Numerous entities were found specifically to have been extensively involved in market manipulation of the western electric markets. The entities include: AEP, Aquila, Avista, BPA, Coral Power, Duke, Dynegy, Enron, Idaho Power, LADWP, Mirant, PG&E, PacifiCorp, Portland General, Powerex, Reliant, Sempra, Sierra Pacific, Southern California Edison, and Williams.⁵ The FERC staff recommended a total of thirty entities be directed to show cause why their behavior did not constitute gaming or other anomalous market behavior, and even that some licenses be revoked.⁶ The FERC staff found that market dysfunction in the California short-term markets affected long-term contracts, and recommended using the information in the report to find that long-term contracts were not just and reasonable.⁷ FERC also found that spot prices in the northwest during January – June 2001 were considerably out of line with input costs.⁸

For gas markets, FERC found that market dysfunctions related to marketer misconduct, such as transaction misreporting and wash trading.⁹ Spot prices reflected charges that far exceeded the cost of transportation.¹⁰ FERC concluded that the gas prices were not the product of a well-functioning competitive market.¹¹

³ FERC's *Final Report on Price Manipulation in Western Markets*, Docket No. PA02-02-000, March 26, 2003, p. 2 (attached hereto as Exhibit 1). The entire FERC Report of March 26, 2003 is available at <http://www.ferc.gov/western.htm>.

⁴ FERC's *Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies*, Docket No. PA02-02-000, August, 2002, which is available at [www.ferc.gov/electric/bulkpower/pa02-2/Initial Report-PA02-2-000.pdf](http://www.ferc.gov/electric/bulkpower/pa02-2/Initial%20Report-PA02-2-000.pdf).

⁵ *Id.* at 7.

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ One example is a single trader who increased the daily average price of gas \$8.54/MMBtu in December 2000. *Id.*

¹¹ *Id.* at 5.

A. Market Manipulators are Public Utilities under Montana Law

The Commission has jurisdiction to supervise, regulate and control the operations of public utilities in Montana. M.C.A. §§ 69-1-102 and 69-3-102. The Commission's jurisdiction applies to any public utility doing business in this state. M.C.A. § 69-3-110.

Under Montana law, a "public utility" is defined as:

every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery or furnishing to other persons, firms, associations, or corporations, private or municipal: ...
(d) power in any form and any agency.

M.C.A. § 69-3-101. Based on that definition, the following entities are some of the "public utilities" in Montana: British Columbia Power Exchange Corp., Illinova Energy Partners, Inc., PacifiCorp, Puget Sound, PG&E Energy Trading-Power, L.P., PPL, Avista, Enron Power Marketing, Inc., Energy West, Duke Energy Trading and Marketing, LLC, and TransCanada Gas Services.

Several of these entities are registered with the Commission as electricity and gas suppliers,¹² who, based on the information released by FERC in its investigation, are tied to the manipulation of the western energy markets, including British Columbia Power Exchange Corp., Illinova Energy Partners, Inc., PG&E Energy Trading-Power, L.P., Enron Power Marketing, Inc., and Duke Energy Trading and Marketing, LLC. Furthermore, the Commission has jurisdiction under M.C.A. § 69-8-407 to protect

¹² Lists of all registered electric and gas suppliers are on the Commission's website at <http://www.psc.state.mt.us/scripts/elecLicense/EleclicenseSearch2.asp>; <http://www.psc.state.mt.us/scripts/elecLicense/EleclicenseSearch3.asp>; <http://www.psc.state.mt.us/scripts/elecLicense/EleclicenseSearch4.asp>; and <http://www.psc.state.mt.us/scripts/gasLicense/gaslicensedisplay.asp> .

consumers, distribution service providers and electricity suppliers from anticompetitive and abusive practices. A.R.M. § 38.5.6010. The Commission also has authority to revoke the licenses of, and impose penalties on, any electricity supplier that has committed fraud or engaged in deceptive practices. M.C.A. § 69-8-408.

B. Effect of Manipulation on Prices in Montana

The prices for gas and electric energy approximately doubled in Montana due to the 2000 and 2001 market manipulations. In 1997, the average price paid by Montana consumers for electricity was in the range between \$22 and \$27 per megawatt hour (“MWH”). According to NorthWestern Energy’s (“NWE”) recent filing, at least its customers will pay between \$41 per MWH. See, Docket No. D2003.6.77, at [REDACTED]. Spread out over a year, this represents an increase of roughly \$80 million dollars in increased charges that NWE’s customers will pay this year. Although Montana’s default supply customers were protected from the worst ravages of the market manipulation in 2000-2001 by a power supply contract between the former Montana Power Company (now NWE), and PPL Montana, the residual effects of the market manipulation have not been determined and it is probable that NWE’s current default supply pricing for its electricity customers contains a premium associated with the misconduct of 2000-2001.

Industrial customers of NWE were not so lucky and they paid a terrible price for the misconduct of the companies that engaged in market manipulation. During the height of the Western Energy Crisis, those companies that were able to continue operating were forced to buy under short-term contracts that were often in excess of \$100/MWH. The industrial class as a whole paid roughly three to four times as much for power during 2000-2001 as they had the prior year, or approximately \$50 million dollars more, to meet

their electricity demands than they had the year before. Petitioner Flathead incurred additional energy charges of at least \$1 million for 2 MW of power purchased from the Big Fork Hydro during the 2000-2001 period. Flathead also incurred millions in additional charges for power purchased during 2002 as compared to 2001 as the result of entering into long term power contracts to stave off being subjected to market prices in 2002.

Montana's natural gas customers were also protected from the worst of the gas market manipulation, which FERC discovered went hand in hand with the energy market manipulation on the part of companies such as Reliant, Williams and El Paso. As part of the restructuring of the former Montana Power Company's natural gas utility, Montana Power Company spun its natural gas production assets to a third party that supplied the bulk of natural gas sold to Montana Power Company's natural gas default supply. By Commission-approved stipulation, the contract was roughly set at \$1.50-\$1.60 per million cubic feet ("Mcf") during the 2000-2001 period. Now, NWE proposes that natural gas prices for Montana residential customers be adjusted to approximately \$4 per Mcf. The difference is roughly two-and-a-half times what customers had paid under the default supply contract for the same volume of gas.

Retail customers who bought from competitive natural gas suppliers in late 2000 and early 2001 were also forced to pay much higher prices for natural gas supply, on the order of two to two-and-a-half times what they had paid in prior years. For example, in January of 2001 alone, customers who bought at market prices in Montana paid roughly \$10/Mcf. Of the approximately 3 to 4 Bcf of customer load that was buying at market, those customers paid roughly \$2 million dollars more for one month of natural gas than

they had paid the prior January. It is also the case that in Docket No. D2001.10.136, Energy West Resources passed on substantial gas cost increases to their core customers in a gas tracker as a result of spikes in market prices in 2000 and 2001.

All told, the damages to Montana consumers, both direct and indirect purchasers, runs into the millions of dollars. There is also no question that the conduct of the parties identified by FERC as part of market manipulation schemes caused the harm to Montana's electric and natural gas consumers. The market manipulators benefited from their actions that damaged Montana's consumers.

C. Commission is Required to Protect Montana Consumers from Unjust and Unreasonable Rates

The Commission has a duty to ensure rates for Montana consumers are just and reasonable. M.C.A. § 69-3-201. Specifically, every public utility that provides “any heat, light, or power” or “for any service to be rendered as or in connection with any public utility” shall charge rates that are “reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful.” M.C.A. § 69-3-201. “The [C]ommission shall inquire into any neglect or violation of the laws of this state by any public utility, as hereinbefore defined, doing business in this state.” M.C.A. § 69-3-110(1). As stated previously, the Commission “shall promulgate rules that protect consumers, distribution services providers, and electricity suppliers from anticompetitive and abusive practices.” M.C.A. § 69-8-403(7). Those rules were promulgated, and appear at A.R.M. § 38.5.6010(2), giving the Commission the authority to investigate complaints of deceptive, false, or fraudulent misconduct and to impose fines upon a finding of such behavior. Consequently, the Commission has numerous statutory and

regulatory directives that require it to investigate violations, protect consumers, and ensure just and reasonable rates.

Once the Commission finds a violation by a public utility, the Commission “may compel compliance with the provisions of this chapter and of the orders of the commission by proceedings in mandamus, by injunction, or by other civil remedies.”

M.C.A. § 69-3-110(5). “The [C]ommission may order refunds or credits of rates, tolls, or charges collected in violation of this section and may order payment of interest at a reasonable rate on the refunded amount.” M.C.A. § 69-3-305(3). Also, the Commission may revoke or suspend a license of an electricity supplier, impose a penalty, or both, for just cause on the commission's own investigation or upon the complaint of an affected party if it is established that the supplier committed fraud or engaged in deceptive practices. M.C.A. § 69-8-408(1). As a result, the Commission is required to inquire into the effects of the violations of law by the market manipulators, and is empowered to compel compliance with the requirement to charge reasonable and just rates by imposing penalties, injunctive relief and other civil remedies, such as ordering refunds.

V. CONTACT PERSONS

All communications in this docket should be directed to Petitioners’ attorneys for this Docket:

Michael J. Uda
DONEY, CROWLEY, BLOOMQUIST & UDA, P.C.
Diamond Block, Suite 200
44 W. 6th Ave
P.O. Box 1185
Helena, MT 59624-1185
Telephone (406) 443-2211
Facsimile (406) 449-8443
Email: muda@doneylaw.com

In addition, communications in this docket should be directed to Petitioners:

Mr. Mike McGrath
Attorney General of Montana
215 N. Sanders, 3rd Floor
P.O. Box 201401
Helena, MT 59620-1401

Ms. Linda Hewitt
Flathead Electric Cooperative, Inc.
2510 Hwy. 2, East
Kalispell, MT 59901

VI. CONCLUSION AND RELIEF REQUESTED

To the extent that the Commission finds that any of the public utilities in Montana engaged in deceptive or fraudulent or anticompetitive or abusive practices, it should immediately suspend the licenses of each such public utility and fine them the maximum amount allowed by M.C.A. § 69-8-408(2) of \$1,000 a day for each day that the Commission determines that such deceptive, fraudulent, anticompetitive or abusive practices continued. The Commission should further order refunds to any electric or natural gas retail customer, whether it purchased such electric or natural gas directly or indirectly, to the extent it finds that any such customers paid in excess of the just and reasonable rate for power or electricity. Petitioners request that the Commission refund all rates paid that were unjust and unreasonable, plus interest on those unjust and unreasonable rates.

RESPECTFULLY SUBMITTED THIS 30th DAY OF JUNE 2003.

DONEY, CROWLEY, BLOOMQUIST & UDA, P.C.

BY: _____
Michael J. Uda
Attorneys for Petitioners